Adopted: 6/08/89

Dissenting Statement
of
Commissioner James H. Quello

Re: St. Louis City Communications, Inc., CSR-3137

The issue in this case is fairly complex, involving nuances of our investor tax certificate policy that are designed to assist minority ownership in broadcasting and cable. On the specific, indeed unique, facts now before us, I would grant a tax certificate to St. Louis City Communications, Inc. (SLCC). In my judgment, the Commission's decision does not promote minority ownership, contravenes our policy of changing tax certificate policies on a prospective basis and is procedurally defective.

Before proceeding with the specific facts in this case, it is important to review the policy goals of our minority tax certificate policy. In 1978, the Commission established the important objective of promoting minority ownership through the tax certificate policy. Policy Statement: Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 (1978) (1978 Minority Policy Statement). According to that policy, a tax certificate would be granted to a broadcast licensee that transferred its facility to a minority controlled entity. The policy was designed to benefit the minority purchaser by creating an incentive for the seller, through the tax certificate, to sell to a minority.

573a

Because the 1978 Minority Policy Statement was too restrictive, the Commission expanded the tax certificate policy, thereby encouraging further investment in minority enterprises and facilitating the use of tax certificates as a means of creative financing. Policy Statement and Notice of Proposed Rulemaking, Gen. Docket No. 82-797, 92 F.C.C.2d 849 (1982) (1982 Minority Policy Statement). One innovation adopted was the investor tax certificate. Investors providing "start up" financing, which allows for acquisition of the property, and investors who purchase shares within the first year after the license is issued, which allows for the stabilization of the capital base, are eligible for an investor tax certificate. Id. at 857. So as not to unduly restrict the alienability of their interests, the Commission stated further:

> Additionally, the **identity of the divesting shareholders, as well as the identity of those purchasing the divested shares, is not material,** because the goal behind expanding the tax certificate policy is to provide minorities opportunities to procure financing and thereby increase minority ownership of broadcast stations. (emphasis supplied)

Id. at 858. Concerning additional eligibility requirements for obtaining an investor tax certificate, the 1982 Policy statement concluded:

> Generally, to be eligible for a tax certificate, such transactions must not reduce minority ownership of and control in the entity below 51 percent. (emphasis supplied)

Id. at 857. Emphasis should be placed on the word generally, for the Commission stated in a footnote that:

> By so requiring remaining 51 percent minority control, we do not mean to preclude consideration of cases where "minority involvement would have been significant enough" to justify the issuance of a tax certificate in the first instance. (_See_ paras. 8 and 12, _supra_).

_Id_. at 857 n. 39. The paragraphs referenced by this footnote refer to the Commission's decision to reduce eligibility requirements for limited partnerships from 51 percent to 20 percent. The footnote also references a paragraph discussing the need for a more creative and expansive approach to the administration of tax certificates. _Id_. at 855. Therefore, as drafted, the policy statement does not expressly preclude the type of tax certificate envisioned by SLCC.1/ It is worth noting that the concerns expressed in the _1982 Minority Policy Statement_ were not limited to initial acquisition. Rather, the Commission recognized the need to establish a more stable capital base for minority enterprises. Indeed, as with any generalized statement of policy, the key question is whether a particular transaction promotes the goals that underly the policy.

All agree that the pivotal case in this proceeding is the Bureau's decision in _Connection Communications Corp_., CSR-3038 (M.M. Bur., April 23, 1987). In that case, the Bureau granted a tax certificate to the controlling minority investor pursuant to the investor tax certificate policy. The shareholders in that

----

1/ The Commission has extended the investor tax certificate policy to cable television. _Policy Statement on Minority Ownership of Cable Television Facilities_, 52 R.R.2d 1469, 1472 n.16 (1982).

case were selling their stock back to the corporation which in turn was transferring its assets and cable franchises to a third party.

Relying on Connection, SLCC requests that the Commission grant it a similar investor tax certificate. The unique aspect of the request, however, is that the tax certificate be given to the corporation as opposed to the individual investors. Of course, the stock repurchase by the corporation in Connection was part of the overall sale to a non-minority third party. Thus, there appears to be little practical difference between granting a tax certificate to a controlling minority shareholder who sells his stock back to a corporation as part of an overall transfer to a third party and giving the certificate to the corporation itself. Drawing such a distinction elevates form over substance. Accordingly, I believe the teachings of Connection apply to the instant case. In any event, pursuant to the precedent established in Connection, William Johnson and Chase Enterprises, as individuals would be eligible for a tax certificate.2/

2/ There are two principals involved, William Johnson is the controlling minority shareholder who originally owned 80% of the stock in the corporation. The remaining 20% is allegedly owned by the St. Louis Philanthropic Organization Inc. This ownership interest is disputed by SLCC and is the subject of pending litigation. To secure adequate financing, Johnson has transferred 50% of his interest to Chase Enterprises. Chase also retains an option to purchase Johnson's remaining shares.

I would grant the tax certificate to SLCC for two fundamental reasons. First, based on the rather unique circumstances of the case, I believe that minority ownership in cable television would be facilitated. Second, even assuming the majority's position regarding the Connection case, our policy regarding prospective changes in our tax certificate policy as well as the procedural errors in this case compel a grant.

On the facts before us, St. Louis City Communications is located in an area that is essentially surrounded by cable systems owned and operated by Tele-Communications, Inc. (TCI). Given the pattern of acquisitions in the cable industry, TCI appears to be the only logical purchaser of the system. Moreover, petitioner states the sale to TCI would settle pending litigation. In my opinion, the pending litigation regarding ownership of the system makes this case unique because the litigation affects the station's alienability. Together, these factors make the sale to an individual minority cable operator unlikely. TCI is the only realistic purchaser of the system. It does not appear that there is a viable minority purchaser for the system, a situation not likely to be replicated in other markets.

Confronted with this situation, the issue is what policy would best promote minority ownership. In the instant case, SLCC, as a corporate entity, proposes to reinvest the proceeds of the sale and acquire a controlling interest in another broadcast or cable facility. Such a commitment is not required by our existing tax certificate policy, which merely requires that a seller reinvest in communications properties to be eligible for a tax deferral. These investments may be passive, however, with the minority investor no longer in a controlling position. Because a condition would be placed on the certificate itself, SLCC will ultimately be in control of facilities presumably reaching larger audiences, thereby fostering the diversity goals of our minority ownership policy.

A fundamental objective of the 1982 Minority Policy Statement was to promote "stabilization of the entity's capital base." 1982 Minority Policy Statement, 92 F.C.C.2d at 857. Granting a tax certificate to the corporation in this case is consistent with this objective because it allows the original investors to preserve a pool of minority controlled capital. Moreover, giving the certificate to SLCC, provides a strong incentive for the noncontrolling, non-minority investor, Chase Enterprises, to remain involved in the investment.3/ In

----

3/ The policy position taken by the majority creates an unfair investment climate for minority entrepreneurs. Non-minority investors are allowed to contribute "start up" capital, sell their investment to anyone and obtain an investor tax certificate. Minority entrepreneurs who invest in themselves and hold controlling interests are unable to enjoy similar tax benefits. Moreover, with the demise of the General Utilities Doctrine, the remaining controlling minority shareholder is taxed at two levels, corporate and individual, upon the sale of the cable system. Such an approach is simply bad policy, providing a disincentive for minorities to invest in their own enterprises.

some respects, the facts before us are more compelling than cases granting certificates to individual investors, who then take the proceeds and invest in non-minority controlled media interests.

The majority disapprove the tax certificate stating that it should be given only if SLCC transferred its cable system to another minority controlled entity. They assert that if the Commission's policy is successful, two systems would be under minority control. Of course precisely the opposite occurred in this case. Given the unique facts of this case, minority purchasers were unlikely, at best. Because of the condition placed on the certificate, granting the tax certificate would guarantee the American public a larger, more significant minority controlled broadcast or cable outlet. The majority's approach gives no assurance that Mr. Johnson or Chase Enterprises will continue to invest in media facilities that are minority controlled. Thus, instead of having two minority controlled outlets, we have _none_. It is ironic that in the name of promoting minority ownership the Commission has adopted a policy that, at least in the context of this case, may result in a net decrease in the number of minority controlled media facilities.4/

4/ Because of the unique facts of this case, I need not address the broader policy issue concerning whether the Commission should _routinely_ grant tax certificates to incumbent minority owners when they sell their properties to non-minorities.

There is a second, independent justification for granting the tax certificate in this case. The majority now hold that the Bureau's decision in Connection no longer controls. Of course, the Commission is not bound by a Bureau decision. In the area of tax certificates, however, the Commission has generally followed a policy of making changes limiting application of the policy prospectively. For example, when the Commission changed its policy regarding the grant of partial tax certificates, it changed the rule prospectively. See Policy Statement on the Issuance of Tax Certificates, 52 R.R.2d 757, 758 (1982). This makes eminent sense. Tax considerations are an important part of media transactions. Undue hardship results if the Commission changes its tax certificate policy without fair warning. Indeed, the 1982 Minority Ownership Policy statement recognized this fact and created a procedure where

----

Continuing 4/ However, I shall discuss it because the majority appear to reach this issue. The primary concern appears to be that such a policy would create an incentive for minorities to "sell out," thereby reducing the number of minority owners. First, there is no indication that such a policy would have a negative impact on entry level minority ownership. Based on an informal survey of cases, there have been approximately 183 minority tax certificates granted since 1978. Approximately 7 (3.8%) of these transactions involved minority to minority transfers. Thus, an overwhelming majority (96%) of minority broadcasters acquired their facilities from non-minority entities. Obviously, granting tax certificates to incumbent minority controlled entities upon the sale of their facilities would not diminish the incentives for non-minorities to use the tax certificate policy to sell to minorities. Second, requiring minority owners to reinvest in controlling interests ensures that there would be no decline in minority ownership. On the contrary, they would be in a position to reach larger audiences. On balance, such a policy would not impair minority ownership in broadcasting and cable.

parties could request declaratory rulings in order to reduce such uncertainty. See 1982 Minority Ownership Policy, 92 F.C.C.2d at 858 (1982).

If the Commission wishes to overrule the Connection case, then it should do so prospectively. In Connection, an investor tax certificate was granted to the controlling minority shareholder upon the sale of his shares. To now hold that the Bureau was unaware of the facts before it, thereby limiting the case's precedential value, is unfair in the context of our tax certificate policy.5/ It is reasonable to assume that Bureau or Commission decisions are made with full knowledge of the facts. Based on Connection, the Bureau expanded the application of the investor tax certificate policy. It is worth noting that the Bureau decisions cited by the majority predate the Connection case and are premised on the 1978 Minority Ownership Policy and not the investor tax certificate policy established in 1982.

Finally, I must disagree with the procedural course this case has taken. Consistent with the recommendations expressed in the 1982 Minority Policy Statement, SLCC sought a ruling from

----

5/ The simple unfairness of the decision is exacerbated because the majority's decision not only denies a tax certificate to SLCC but appears to prevent Mr. William Johnson, as an individual, from receiving an investor tax certificate. If SLCC had known in advance of the Bureau's incorrect assessment of the facts in Connection, it would have had the opportunity to either restructure its corporate form or its arrangement with TCI.

the Commission. The Commission decided to grant the tax certificate and a press release was issued. I recognize that, generally, press releases do not constitute official Commission action. See Microwave Communications, Inc. v. FCC, 514 F.2d 385 (D.C. Cir. June 27, 1974). However, unlike the MCI case, the issue is not merely computing time for the purpose of filing a timely appeal. Also, we are not confronted with a situation where the case turns on a difference in language between a press release and an official Commission decision. A certificate was granted. At the time of the grant, there was no opposition to the tax certificate. The only remaining action to be taken by the Commission was the ministerial act of releasing its decision and the certificate. I believe it was reasonable for SLCC to rely on the Commission's grant as reported in its press release. Unfortunately, by changing its mind the majority has denied SLCC the opportunity to structure its transaction with TCI to minimize its tax consequences. Such a result hurts our minority ownership objectives by unnecessarily reducing the pool of minority controlled capital that is available for subsequent investment. Because the grant of a tax certificate would promote minority ownership in this case, the Commission should stand by its decision.

It appears we have placed the petitioners in an impossible situation. First, Section 1.108 of our rules states that: "The Commission may, on its own motion, set aside any action taken by it within 30 days from the date of public notice of such action." Obviously 30 days have passed since the date the Commission first approved the tax certificate. According to the majority, however, the thirty-day time period does not commence until the _public notice_ is issued. The rule refers to § 1.4(b) for the definition of public notice, which states that public notice occurs upon the release date of the _full text of the document_. 47 C.F.R. § 1.4(b)(2). Under this interpretation, the Commission could keep the thirty-day time period from running by simply not releasing the document. The majority's construction of § 1.108 would keep parties in administrative limbo for years.6/ Under this scenario, interested parties have no idea what is being reconsidered because they have no chance to review a released document. A more appropriate reading of § 1.108 would be that public notice is a condition precedent to _sua sponte_ review by the Commission. Such an approach provides interested parties with an opportunity to examine the initial decision and perhaps comment on it. Under this interpretation, the majority would be precluded from engaging in a _sua sponte_ reconsideration until it released a decision. This construction is more consistent with the goals of administrative fairness.

6/ This is not a case where the filing of a petition for reconsideration tolls the time period for _sua sponte_ reconsideration by the Commission. _See Central Florida Enterprises, Inc. v. FCC_, 598 F.2d 37, 48 n.51 (D.C. Cir. 1978). Although the Commission has received correspondence in this case, none appears to constitute a petition for reconsideration as defined in our rules.

In summary, I believe minority ownership would be enhanced by granting a tax certificate in the instant case. We have done a great disservice to SLCC. Under the majority's approach, we have no assurance that the parties in this case will invest in media entities that are minority controlled. In a broader sense, we have also hurt existing minority owners by creating a disincentive for minorities to invest in their own facilities. Accordingly, I dissent.

Adopted: January 30, 1989

Separate Statement
of
Commissioner James H. Quello

Re: Amendment of the Commission's Rules to Allow the Selection from among Competing Applicants for New AM, FM and Television Stations by Random Selection

Our proposal to extend our lottery procedures to full service broadcast facilities evidences our concern that the Commission's existing comparative procedures appear unable to bring service to the public in a timely and cost effective fashion. While it is true that lotteries have been successful in reducing massive backlogs in the low power service, our experience with cellular demonstrates lotteries may create more problems then solutions.

While I am willing to explore expansions of lottery procedures to full service broadcasting, it may not be the panacea envisioned by its proponents. The Commission's ultimate responsibility is to select the best applicant. In our attempt to expedite the process we must not lose sight of this statutory obligation. If lottery procedures are ultimately employed, then the Commission must make sure that all lottery applicants have the highest financial, technical and character qualifications.

On balance, the lottery proposal deserves to be open to public discussion. It must be remembered, however, that Congress has imposed a heavy burden on the Commission to justify extension of lottery procedures to full service facilities. I intend to examine the issues in this proceeding closely so as to ensure that the Commission remains faithful to its statutory obligations.